Supreme Court of the United States

October Term, 1948.

No. 792.

INTERNATIONAL HARVESTER COMPANY, Petitioner,

versus

NELLIE IRENE TROUTMAN, Administratrix of the Estate of Phillip A. Troutman, Deceased, - - - - - - - - - Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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June 8, 1949.

WESTERFIELD-SCHITZ CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

TABLE OF CASES CITED.

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I.

STATEMENT OF THE CASE.

Phillip A. Troutman, a resident of Louisville, Kentucky, at the time of his death on June 12, 1947, and for a number of years prior thereto, was a member of Local 64 of Falls Cities Carpenters District Council, and as such he would be assigned to work for different contractors who put in a request with the Falls Cities Carpenters Council for journeymen carpenters to be furnished to the contractor.

The International Harvester Company, on June 11, 1947, at its Louisville plant was having Building 6 constructed. The Struck Construction Company was the contractor doing the concrete work for said building, and Beasley Construction Company was the contractor doing the structural iron work on the building. On June 11, 1947, and since about December 5, 1946, Troutman was employed as a carpenter by Struck Construction Company on the Harvester job. On June 11, 1947, a channel door frame was found to be out of plumb and a controversy arose between the foreman for Struck Construction Company and the foreman for Beasley Construction Company as to what caused the door to be out of plumb. The foreman for Struck contended that the foundation was right but the steel was wrong at the top, so the foreman for Struck decided to have Struck's employee, Troutman, and his co-worker, George Hite, to climb up and to plumb the door frame.

Although Building 6 had not been completed, Harvester was using said building. Said building contained a large overhead travelling electric crane which ran on I-beams or crane girders located along each side of the building about 25 feet above the ground. Three angle irons below the crane girder supplied the electricity to the crane. The runner rail, upon which the crane wheels carrying the crane ran, was above the angle irons which were charged with electricity. The angle irons were constructed entirely differently from the runner rail which carried the crane wheels.

The rail on which the crane wheel ran, the angle irons which were charged with electricity, and the transite which covered the walls were all of the same color—a light gray or silver color. The runner rail on which the crane wheel ran was exactly like a street car rail, without being charged with any current.

Harvester knew, or should have known, that Troutman and other employees of the Struck Construction Company would be working near the angle irons charged with electricity in attempting to plumb the door frame. Harvester had two engineers, Mr. Parthemor and Mr. Newkirk, on the grounds to see that Struck Construction Company did the work properly, and these engineers talked with Mr. Williams, Struck's foreman, quite often (R., pp. 21, 22).

Before S. L. Williams, foreman for Struck Construction Company, told Troutman to go to the top of the door frame and plumb the door frame, no one for Harvester gave Mr. Williams any warning or information about the danger of the angle irons (R., p. 21).

Troutman was not told to watch or to be careful of the angle irons which were charged with electricity, but was told to watch the rails (R., pp. 78 and 79).

No one pointed out to Troutman what was "hot" up there, or told him that the angle irons were "hot" (R., p. 50).

Troutman, while plumbing said door frame at a height of some 25 feet above the ground, put his hand or foot upon the charged angle irons, received an electric shock, and fell to the ground, and as a result of the injuries sustained he died on the following day.

At a trial before a jury in the Federal District Court for the Western District of Kentucky, in an action for damages for Troutman's death which his Administratrix claimed was due to Harvester's negligence, the jury found a verdict for $17,000.00, upon which the Court entered a judgment.

II.

ARGUMENT.

Question (1) which the petitioner states is involved here is certainly an imaginary question. It is true that in the trial court and again before the Sixth Circuit, Harvester vigorously contended that Troutman was guilty of contributory negligence. Both the trial court and the Sixth Circuit were of the opinion that the question as to whether or not Troutman was guilty of contributory negligence was one for the jury. No one ever contended, either in the trial court or before the Sixth Circuit, that under the law "Federal courts cannot direct a verdict upon contributory negligence in any case." The petitioner herein is not warranted in stating that the trial court felt that this Court disapproves the direction of a verdict by any Federal trial court in any case upon the ground of contributory negligence. The trial court certainly did not express any such view orally or otherwise. The trial court took cognizance of the fact that in certain cases it was proper to direct a verdict upon the ground of contributory negligence but in other cases the question of contributory negligence was one for the jury. The trial

court wrote an opinion when the motion for a new trial was overruled and in rejecting the contention that there should be a directed verdict upon the ground of contributory negligence (R., pp. 132, 133, 134), the trial judge said:

> "Defendants do not contend seriously upon their motion that there was not sufficient evidence on the part of the plaintiff to justify a submission of the case to the Jury, but are very earnest in their contention that the decedent was guilty of contributory negligence so as to preclude any recovery; contending that the evidence as to contributory negligence is so overwhelming as to leave no room for doubt, citing many cases in support of their contention, some of which are—
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> Cunning v. Cooley, 281 U. S. 90.
>
> Atchison, Topeka & Santa Fe Ry. Company v. Toops, 281 U. S. 351.
>
> Troutman v. Mutual Life Insurance Co. of N. Y., 125 F. 2d 769 (CCA 6).
>
> International Harvester Company v. Langermann, 262 F. 498 (CCA 8).
>
> "They insist that that doctrine is peculiarly applicable in this case because of the rule announced by the Kentucky Court of Appeals in such cases as City of Owensboro v. York's Adm'r, 117 Ky. 294; Citizens Telephone Company v. Westcott's Adm'x, 124 Ky. 684; Capital Gas & Electric Company v. Davis, 138 Ky. 628, City of Owensboro v. Winfrey, 191 Ky. 106 and Ky. & West Virginia Power Company v. Brown's Adm'x, 281 Ky. 133.
>
> "They emphasize the warnings given Troutman before and at the time he endeavored to assist

in plumbing the door jam and contend that this case comes within the rule announced by the Kentucky Court of Appeals in cases involving injury by electricity, that a person, knowing that an appliance is charged with electricity, must not trifle with the appliance and if he voluntarily touches it and is killed or receives serious injury, it cannot be said that his conduct was other than negligent so as to preclude recovery. They call particular attention to the decision of the Sixth Circuit Court of Appeals in the case of Monongehela West Penn. Public Service Company v. McNutt, 13 F. 2d 847 (CCA 6).

"The Sixth Circuit Court of Appeals, in the case of Scott, *et al.* v. United States, 161 F. 2d 1009, laid down this rule with respect to a trial judge directing a verdict:

"More than twenty-five years ago, this Court said in Begert v. Payne, 274 Fed. 784, 787, 788 (CCA 6):

" 'It is a common place that upon a motion by a defendant for instructed vrediet, it is the duty of the trial judge to give the plaintiff the benefit of every fair inference which might reasonably be drawn by the jury from the evidence, only guided by sound processes of reasoning and applicable principles of law. The credibility of witnesses is peculiarly for the jury. * * *'

"A verdict cannot properly be directed for defendant merely because the trial judge feels that, should the jury find in the plaintiff's favor, he would regard it his duty, in the exercise of a sound judicial discretion to set the verdict aside.

"The test is whether there is such an utter absence of substantial evidence as to make it his

duty, as matter of law, to set the verdict aside independently of the exercise of discretion, and without reference to how greatly the Court may think the conflict in testimony to preponderate in favor of defendant."

The Judges of the Court of Appeals for the Sixth Circuit who heard the argument in this case, did not suggest that this Court disapproves the direction of a verdict by any Federal trial court in any case upon the ground of contributory negligence, but during the oral argument Judge Martin did suggest to counsel that under the facts in the within case the question of contributory negligence was one for the jury. The judgment of the Sixth Circuit Court stated that it appeared that there was substantial evidence to support the verdict of the jury, and for the reasons given in the opinion of the District Judge in acting upon the motion for a new trial the judgment of the District Court was affirmed.

Unquestionably, the law in Kentucky must be followed in the Federal courts in such a case as this. Clear and undisputed contributory negligence bars recovery.

The law is well-settled in Kentucky that, under evidence similar to that proven in the within case, the trial court should not take the case from the jury upon the question as to whether the plaintiff was contributorily negligent.

In Louisville Gas & Electric Co. v. Beaucond, 188 Ky. 725, 224 S. W. 180, a trouble man for the telephone company came in contact with the electric wires on the

pole of the electric company, and he received a shock which caused him to fall 30 feet to the sidewalk below. He recovered a verdict against the electric company, and in affirming the judgment of the lower court the Kentucky Court of Appeals said:

> "Before one as a matter of law can be held to have been so contributorily negligent as to be denied a recovery because of having exposed himself to a known danger, the danger must be so imminent and obvious that a person of ordinary prudence, under like circumstances and with like knowledge, would not subject himself to it. Louisville Gas Co. v. Fry, 147 Ky. 757, 145 S. W. 748; Bowling Green Gaslight Co. v. Dean, 142 Ky. 678, 134 S. W. 1115; F. E. I. Co. v. Anglea, 142 Ky. 539, 134 S. W. 1119. There is no evidence which conduces to show that the plaintiff purposely or voluntarily came in contact with the wire of the defendant, but if his testimony is to be believed he involuntarily did so, through accident or inadvertence, and his coming in contact with it was made possible by the fact of the close proximity of the wire to the pole, and his injuries from the wire being protected with an insufficient insulation. It is also insisted by the defendant that if the plaintiff has ascended upon the other side of the pole he would have escaped coming in contact with the wire of defendant, and that he negligently ascended upon the side of the pole where it was dangerous, instead of upon the other side, where the ascent was safe. Upon the other hand, there is evidence that upon the side of the pole opposite to the wire complained of there were 12 of defendant's wires, some of which were within 4 or 5

> inches of the pole, while other evidence tended to prove that the nearest was 36 inches from the pole. There were also other wires upon the opposite side of the pole from which the plaintiff ascended—guy wires, both of the defendant and the Louisville Railway Company—and upon the whole the questions as to which side of the pole in the exercise of ordinary prudence he should have ascended became a question for the jury, and was so submitted. Upon all the facts, both those disputed and those conceded, and the inferences to be drawn from them, we conclude that the court could not have taken the case from the jury upon the question as to whether the plaintiff was contributorily negligent."

The question as to whether or not Troutman was guilty of contributory negligence was submitted by the trial court to the jury under carefully worded instructions. The jury was told that if they believed that Troutman was guilty of contributory negligence, the law in the case was for Harvester and the jury should so find.

Troutman had nothing whatsoever to do with the electrical work which was done on Building 6. Troutman was employed by Struck as a carpenter. There is nothing to warrant the conclusion that Troutman knew that when the ironworkers referred to "hot" rails they were referring to angle irons. A rail on which a wheel runs is known to the ordinary lay person as a rail. Angle irons are entirely different from the crane rail.

The proof does not show that Troutman knew that the angle irons were charged with electricity.

Troutman was not attempting to experiment. He climbed to the top of the door for one purpose only, to wit, to plumb the door. Whether or not the warnings called to Troutman were sufficient to put him on notice that what was hot and what was charged with electricity were the angle irons which were of the same aluminum color as the iron girders and the steel beams, was a question for the jury.

It is true that witnesses for the petitioner testified that Troutman was told as he went up to the top of the door that the rails were hot and to watch the rails. The structural ironworkers refer to angle irons as rails. The rail on which the crane wheels ran was not charged with electricity. There is a big difference in appearance between the angle irons and the rail. Whether or not Troutman understood what was meant when he was told to watch the rails, and that the rails were hot, was properly a question to be considered by the jury. Consider further the fact that the witnesses who testified that there were warning signs on the columns stated that the warning signs were 25 feet away from where Troutman came in contact with the rails.

The facts in the within case are entirely different from the facts in the various cases cited by the petitioner in support of the contention that Troutman's own negligence contributed to cause his death. A number of the cases cited by the petitioner deal with situations where the injured plaintiff or decedent touched or picked up a wire charged with electricity after being warned that the wire was charged with electricity.

The manner in which the girders and the angle irons were painted, the fact that transite was the same color as the angle irons and the girders, the fact that the crane rail was entirely different from the angle irons, are all facts which make it questionable as to whether or not an ordinarily careful, prudent man would understand what danger he was being warned about when he was told to watch the hot rails.

Troutman was not a trespasser. Harvester owed him the same duty as is owing an invitee. Troutman did not climb to the top of the door as a matter of choice, but because his foreman, Mr. Williams, instructed him to do so and in doing so he was carrying out work which he was employed to do. There is no proof that Troutman had knowledge of the highly dangerous character of the angle irons.

There is no proof that Troutman, with knowledge of the dangerous character of the angle irons painted the same color as metal which was free from any danger, purposely came in contact with something that he knew was charged with electricity.

POINT B. The Federal Courts Followed the Settled and Governing Decisions of the Highest Court of the State in which the Accident Occurred, and Determined a Question of Local Law in Strict Accordance With the Decisions of That Highest State Court.

The petitioner in this Court refuses to recognize that the Kentucky Court of Appeals has not held that in every case where there is any evidence of contributory negligence there should be a directed verdict.

The Court of Appeals of Kentucky has consistently and repeatedly held that in cases of injury or death by electricity, the facts of certain cases, both those disputed and those conceded and the inferences to be drawn from them, do not make the question of contributory negligence one of law, but require that the case be submitted to the jury upon the question as to whether the plaintiff was contributorily negligent.

The petitioner herein was not deprived of rights guaranteed to it under the Constitution. The trial court and the Sixth Circuit Court recognized and applied the Kentucky law as expressed by its highest court. The trial court instructed the jury that if they believed that Troutman was guilty of contributory negligence, the jury should find for Harvester. This instruction fully protected the rights of Harvester.

POINT C. The Sixth Circuit Court of Appeals Did Not Decide This Case in Direct Conflict With Courts of Appeals for the Other Circuits.

The Court of Appeals for the Sixth Circuit held with the other circuit courts that the law was the same as it has been consistently declared by the Kentucky courts. In making a contrary contention the petitioner herein refers to the case of Monongahela West Penn. Public Service Co. v. McNutt, 13 F. 2d 846. In the McNutt case high-tension wires were carried on a pole. It was known that the high-tension wires carried electricity. The Court took cognizance of the fact that it was known that these high-tension wires were dangerous because in the opinion it is stated:

> "Not only is the highly dangerous character of such wires now a matter of common knowledge but McNutt admits the warning."

Certainly there is a big difference between high-tension wires where, as a matter of common knowledge, it is known that said wires are highly dangerous and angle irons used in connection with a crane where the angle irons are painted the same color as the crane rail and the transite and the structural iron used in the building. There is absolutely no proof to show that Troutman knew that an angle iron was regarded by structural ironworkers as a rail or that Troutman knew the highly dangerous character of angle irons such as those which were charged with electricity. The Ninth Circuit has held that the question of contributory negligence was one for the jury. In the case of McCready v. The Southern Pacific Company, 26 F. 2d 569 (CCC 9), the facts are strikingly similar to the facts in the within case. Troutman was an employee of an independent contractor engaged in constructing Building 6 for Harvester. McCready was an employee of an independent contractor who was engaged in constructing a shop building for the railroad. The building was partially completed, and there was an overhead crane which ran the length of the building. The railroad company had turned the current on and the wires giving power to the crane were charged. The company had placed large signs at various spots, giving warning of the hot wires. McCready was directed by the contractor to remove certain scaffolding with the knowledge that the wires were "hot" and while so doing came in contact with the wires and was injured.

The Court held that the maintaining of danger signals or otherwise advising the public of the presence of wires charged with electricity was not sufficient to enable the company to escape liability, and the question of the defendant's negligence was one for the jury. Although McCready had knowledge of the presence and danger of the charged wires the Court held that he was not guilty of contributory negligence as a matter of law.

Certainly there is no conflict between the Sixth Circuit Court of Appeals and the other circuits with reference to submitting the question of contributory negligence to the jury.

POINT D. The Denial of a Motion for a New Trial in This Case Did Not Permit a Recovery Upon a Complete Misrepresentation Permeating the Entire Case.

Harvester did get a fair trial and respondent's entire case was not presented to the Court and the jury based on a misrepresentation and the true facts were not concealed from Harvester, the Court and the jury before and throughout the trial.

Counsel for Harvester took the deposition of Troutman's widow and knows that she is an humble, uneducated person, and to charge her with misrepresentation is a rather harsh thing. Harvester's counsel does not suggest that plaintiff's counsel participated in any misrepresentation or knew any facts which could in any way mislead or misrepresent the truth. As is shown on page 113 of the record, Troutman, for a number of years, was a member of the Carpenter's

Union and worked for different contractors as a carpenter. In her deposition Mrs. Troutman testified that during nearly all of their married life her husband worked for a member of the Contractors Association. Evidently before the deposition was taken Harvester's counsel made an investigation as to where Troutman had worked and asked Mrs. Troutman whether he had worked for certain named contractors (R., p. 114). Mrs. Troutman certainly was frank and honest in her answers. Answer 15, page 112, Record, shows that she stated that when they were married her husband was working for Ewing-Von Allmen Dairy Company in the freezing room, freezing ice cream.

Petitioner contends that Troutman was experienced as crane operator and electrical machinist. As far as Mrs. Troutman knew, her husband had not been a crane operator and was not an experienced electrical machinist. As far as she knew, he worked in the ice cream room for Ewing-Von Allmen Dairy Company and then had worked as a carpenter for different contractors. Petitioner criticizes the testimony of Mrs. Troutman because when she testified she did not mention that her husband had worked for Tube Turns. It is hard for a lay person to understand how a member of the Carpenters' Union would be working as an electrical machinist. It is common knowledge that there are jurisdictional disputes between different crafts. Mrs. Troutman knew that all during the war period her husband was a member of the carpenter's union and certainly she had no reason to believe that he was a machinist or that he knew anything at all about cranes.

If one is a machinist, it does not necessarily mean that he understands the mechanism of an overhead crane which is operated by current from angle irons.

There was no proof before the lower court that Troutman was a qualified person within the meaning of the safety code. The engineer, Sanders, testified that under the National Electrical Code a qualified person would be an electrician (R., p. 42). Troutman was not an electrician, and although the appellant contends in its brief that Troutman had operated a similar electrical crane himself, there is no proof that Troutman ever operated a crane to which electricity was supplied through angle irons. Troutman was never employed as an electrician, and was never employed as an operator of a crane. If Troutman ever did operate the crane at Tube Turns, he certainly did not operate it as a qualified crane operator, and operated it only when the regular operator was not present. At the most, it could not have been but on several occasions, because, according to the affidavits filed by the appellant, Troutman worked in the tool and die shop as a machinist. This Court knows that many girls and women work in factories where power machines are operated through electricity, and certainly a female operator of an electric power machine would not be considered as a qualified electrician or a qualified electrical crane operator.

The trial judge gave earnest consideration to petitioner's contention that it should have a new trial because of newly discovered evidence. In the exercise of a sound discretion the trial judge, in denying a new

trial on the ground of newly discovered evidence (R., pp. 137, 138) said:

> "I feel that the facts were as fully presented as could be anticipated upon another trial and that the decision of the Jury, that the death of Troutman was due to the failure on the part of the Harvester Company to remove a hidden danger from the place where they knew the work would be done by shutting off the current of electricity during the short interval of time when the carpenters' gang would be engaged in working in and about that portion of the building where they had not customarily worked, is a conclusion for which there was substantial evidence.
>
> "The motion for a new trial is overruled."

The opinion of the trial court is supported by the evidence introduced at the trial and the conclusions arrived at by the trial judge are logical and sound.

CONCLUSION.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent.

Dated June 8, 1949.